Supreme Court, U.S.
FILED
JUL 29 1992
OFFICE OF THE CLERK

No. 92-15

In The

Supreme Court of the United States

October Term, 1992

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,

Petitioners,

v.

LADY BALTIMORE FOODS, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES G. BAKER
SPENCER FANE BRITT & BROWNE
1000 Main Street, Suite 1400
Kansas City, MO 64106
(816) 474-8100

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Question Presented

Whether the district court and the United States Court of Appeals for the Seventh Circuit erred in holding that an amendment to a congressionally-created scheme of economic regulation is not rendered unconstitutional simply because it apparently affects only two entities?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Counterstatement of the Case 1

1. Factual Background 1

2. Proceedings Below 3

Summary of Reasons For Denying the Writ 5

Argument 7

I. CENTRAL STATES HAS FAILED TO MEET ITS BURDEN OF SHOWING THAT THE AMENDMENT IS IRRATIONAL AND HAS NO PUBLIC PURPOSE 7

II. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THIS COURT'S EQUAL PROTECTION DECISIONS 18

III. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLECT WITH THIS COURT'S TAKING CLAUSE DECISIONS 21

Conclusion 24

TABLE OF AUTHORITIES

Page

CASES

City of New Orleans v. Dukes, 427 U.S. 297, 97 S.Ct. 2513 (1976) 6, 8, 9, 10, 18

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 106 S.Ct. 1018 (1986) ..... *passim*

FHA v. The Darlington, Inc., 53 U.S. 84, 79 S.Ct. 141 (1958) 14, 23

Hinson v. NLRB, 428 F.2d 133 (8th Cir. 1970) 20

Hodel v. Indiana, 452 U.S. 314 (1981) 18

Long Island Oil Products Co. v. Local 553 Pension Fund, 775 F.2d 24 (2nd Cir. 1985) 11, 12, 23

Main Central Railway Co. v. Brotherhood of Maintenance Way Employees, 813 F.2d 484 (1st Cir. 1987), *cert. den.*, 484 U.S. 825, 108 S.Ct. 91 (1987) .. 9, 14

Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715 (1981) 21

Morey v. Dowd, 354 U.S. 457, 77 S.Ct. 1344 (1957) 9

Nixon v. Administrator of General Services, 433 U.S. 425, 79 S.Ct. 2781 (1977) 14

NLRB v. Katz, 369 U.S. 736, 82 S.Ct. 1107 (1962) 20

Paramino Lumber Co. v. Marshall, 309 U.S. 370, 60 S.Ct. 600 (1940) 8

Peick v. Pension Benefit Guaranty Corp., 724 F.2d 1247 (7th Cir. 1983) *cert. den.* 467 U.S. 1259, 104 S.Ct. 3554 (1984) 7

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 104 S.Ct. 2709 (1984) 11

TABLE OF AUTHORITIES – Continued

Page

Semler v. Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 571 (1935) 14

United States v. Brown, 381 U.S. 437, 85 S.Ct. 1707 (1965) (White, J. dissenting) 6, 8

United States v. Carolene Products Co., 304 U.S. 144, 58 S.Ct. 778 (1938) 6, 8, 21

Usery v. Turner-Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882 (1976) 6, 7, 22, 23

Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 101 S.Ct. 446 (1980) 22

Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461 (1955) 14

STATUTES

29 U.S.C. § 1381 ..... 11, 13, 23

29 U.S.C. § 1461(h)(1) ..... *passim*

45 U.S.C. § 160 9

Act of August 21, 1986, Pub. L. No. 99-385, 100 Stat. 819 10

No. 92-15

In The

Supreme Court of the United States

October Term, 1992

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,

Petitioners,

v.

LADY BALTIMORE FOODS, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counterstatement Of The Case

1. Factual Background.

Lady Baltimore Foods, Inc. ("Lady Baltimore")[1] and Local Union No. 955, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (the "Union") have been parties to successive collective bargaining agreements from at least

[1] Lady Baltimore is a Kansas corporation. It has no parent, subsidiary or affiliated corporations within the meaning of Rule 29.1.

1969 through the present. Upon expiration of the 1975-1978 collective bargaining agreement, Lady Baltimore and the Union negotiated a new agreement which was executed on January 12, 1979, and which remained in effect through May 15, 1982 (the "1979 Agreement"). The 1979 Agreement included the following pension provision:

> Article XVIII - PENSION
>
> Effective January 12, 1982 all contributions to the Central States, Southeast and Southwest Areas Pension Fund shall cease, Sections 1, 2, 3, 4, 5 and 6 of this Article [which outlined the amount of and conditions for contributions to Central States] shall be null and void and of no further force and effect and all obligations of the Company to said Fund or under any trust agreement shall be terminated. From that date forward regular employees shall be eligible to enter into the Company's pension plan pursuant to the terms and provisions of that plan.

Central States was sent a copy of the 1979 Agreement. It objected to the language quoted above, and threatened to terminate Lady Baltimore's participation effective January 12, 1979 unless the Company entered into "an acceptable collective bargaining agreement." Lady Baltimore and the Union did not alter the 1979 Agreement, but Central States later reversed its position and agreed to permit continued participation by Lady Baltimore.

In April of 1982, following a dispute over the amount of the last payment, Lady Baltimore made its final contribution to Central States, which accepted payment by

cashing Lady Baltimore's restrictively-endorsed check. The restrictive endorsement read: "Accepted by Central States Area Pension Fund in full satisfaction of any present or future claim or liability of any kind against Lady Baltimore Foods, Inc., its officers, agents or assigns."

From October 1964 through January 1982, Lady Baltimore contributed Two Hundred Fifty-Six Thousand Nine Hundred Forty-Eight Dollars and Five Cents ($256,948.05) to Central States. Only a handful of Lady Baltimore employees retired with vested benefits under the Central States plan. As of June 1, 1985, the present value of Lady Baltimore's 1964 to 1982 contributions to Central States exceeded the present value of the amount Central States will likely be required to pay to Lady Baltimore employees by $257,780.00.

2. Proceedings Below.

On November 1, 1985 Central States filed suit in the United States District Court for the Northern District of Illinois (*"Lady Baltimore I"*) to compel Lady Baltimore to make interim payments of its assessed withdrawal liability ($212,797.92) pending the outcome of arbitration. On August 26, 1986, the District Court ordered Lady Baltimore to begin making interim withdrawal liability payments in the amount of $5,001.67 per month. The district court did not address the Fund's claim for interim withdrawal liability payments prior to August 26, 1986.

On October 22, 1986, the Tax Reform Act of 1986 became law. The Act included the provision that with one amendment is now codified at 29 U.S.C. § 1461(h)(1) (the "Amendment", see Petition p. 5). Central States had been

aware of and had opposed the adoption of the Amendment in letters to members of Congress. Also, in October of 1986, Lady Baltimore filed a motion for summary judgment based upon the Amendment. Central States argued, *inter alia*, that the Amendment did not apply to Lady Baltimore because it described a withdrawal "before January 12, 1982," whereas Lady Baltimore had withdrawn on January 12, 1982. On October 14, 1987, the district court in *Lady Baltimore I* concluded that the Amendment applied to Lady Baltimore, but was unconstitutional. The court denied Lady Baltimore's motion for summary judgment and granted a summary judgment motion filed by Central States (Appendix, pp. 51a-71a). It later assessed liquidated damages, costs and attorneys' fees against Lady Baltimore.

On appeal, the Seventh Circuit vacated the district court's finding of unconstitutionality and remanded the matter for arbitration (Appendix pp. 72a-86a). Prior to submission of the case to the arbitrator, the 1989 Budget Act was enacted with an amendment to the Amendment to void the liability of an employer who withdrew from a multiemployer pension plan "before January 16, 1982." Central States then conceded to the arbitrator that the Amendment applied to Lady Baltimore. The arbitrator held that the Amendment voided Lady Baltimore's withdrawal liability assessment and ordered the return of all interim payments with interest, as well as the liquidated damages, attorneys' fees and costs previously paid by Lady Baltimore (Appendix, pp. 38a-56a).

On May 25, 1990 Central States filed suit to vacate the arbitrator's award. The district court in *Lady Baltimore*

II reviewed the post-1980 congressional tinkering with the effective date of the Multiemployer Pension Plan Amendment Act ("MPPAA"), and held: " . . . , we cannot say that the Amendment was not a rational part of Congress' larger scheme to adjust MPPAA to promote fairness among all parties affected by it." (Appendix, pp. 28a-29a). The district court ordered Central States to return the liquidated damages Lady Baltimore had paid in *Lady Baltimore I*, but allowed Central States to keep the attorney's fees it had received.

On June 19, 1991 Central States appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit. On April 1, 1992 the Seventh Circuit affirmed the district court's conclusion that the Amendment was constitutional, but reversed the district court's conclusion that Lady Baltimore was entitled to a return of the liquidated damages paid to Central States in *Lady Baltimore I* (Appendix, pp. 15a-16a).[2]

Summary of Reasons For Denying the Writ

1. The linchpin of Central States' argument is that the Amendment affects only Lady Baltimore and Central States, and therefore is "a purely private bill," that serves "a strictly private purpose" (Petition, pp. 12, 15, 16).

---

[2] Lady Baltimore contends that the district court's award of liquidated damages, costs and attorneys' fees in ***Lady Baltimore I***, almost a year after Congress had adopted the Amendment, was improper.

Central States confuses effect with purpose. Congress clearly can enact legislation affecting only two entities and also be acting with a public purpose.

2. The related contention by Central States that Congress must "deal with the many, rather than the few" (Petition, p. 10) is contradicted by numerous decisions of this Court, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 97 S.Ct. 2513 (1976); *United States v. Brown*, 381 U.S. 437, 473, 85 S.Ct. 1707, 1728 (1965) (White, J. dissenting).

3. It is Central States' burden to present facts which preclude the assumption that the Amendment rests upon some rational basis. *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882 (1976); *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778 (1938). Central States has not met that burden.

4. Instead of meeting its burden, Central States asks this Court to ignore the fact that the legislative history of amendments to MPPAA shows that Congress, having created a somewhat draconian scheme of regulation which was retroactive in nature, thereafter had second thoughts about the effective date of MPPAA. As the district court and court of appeals correctly held, the legislative history and case law surrounding MPPAA demonstrate that in enacting the Amendment Congress was pursuing a rational, public purpose in modifying the scope of the withdrawal liability scheme established in MPPAA.

Argument

I. CENTRAL STATES HAS FAILED TO MEET ITS BURDEN OF SHOWING THAT THE AMENDMENT IS IRRATIONAL AND HAS NO PUBLIC PURPOSE.

To meet the test of substantive due process, legislation need only be rationally related to a public purpose. Moreover, "[i]t is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the Court with the presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892 (1976).[3] The standard set forth in *Turner-Elkhorn* is the appropriate one to measure legislative action in the field of national economic and social policy, such as MPPAA. *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1265 (7th Cir. 1983) *cert. den.* 467 U.S. 1259, 104 S.Ct. 3554 (1984).

It is also Central State's burden to establish that "in the light of the facts made known or generally assumed"

---

[3] While Lady Baltimore agrees with the Seventh Circuit's conclusion that this Court's decisions "impose an extraordinary and perhaps insuperable burden on an individual or firm that challenges the constitutionality of a statute merely because it lacks any perceptible connection to a tenable conception of the public welfare" (Appendix p. 7a), the broader question of whether economic legislation "can ever flunk the rationality test" (Appendix, p. 7a) is not presented by these facts.

the Amendment "is of such a character as to preclude the assumption that it rests upon some rational basis." *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 58 S.Ct. 778, 783 (1938).

The only "fact" which Central States presents to satisfy that burden is the assertion that the Amendment is a private act. This Court has long noted that the Constitution does not prohibit Congress from passing private acts that affect specific individuals. *United States v. Brown*, 381 U.S. 437, 473, 85 S.Ct. 1707, 1728 (1965) (White, J. dissenting); *Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 60 S.Ct. 600 (1940).

Central State's argument that the rationality of legislation is determined by the number of entities it affects has been rejected by this Court. In *City of New Orleans v. Dukes*, 427 U.S. 297, 97 S.Ct. 2513 (1976), the Court considered the constitutionality of a New Orleans ordinance prohibiting pushcart food sales in the French Quarter, except for vendors who had operated there for at least eight years. There were only two such vendors. The remaining vendors, banned from the French Quarter by the ordinance, filed suit. In upholding the constitutionality of the ordinance, the Court held:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

427 U.S. at 308, 96 S.Ct. at 2516-17.

In *City of New Orleans, supra,* the Supreme Court expressly overruled *Morey v. Dowd,* 354 U.S. 457, 77 S.Ct. 1344 (1957). In *Morey* the Court had found unconstitutional a currency exchange regulatory statute that specifically excluded the American Express Company from its prohibitions. Justice Frankfurter dissented:

> Sociologically one may think what one may of the state's recognition of the special financial position obviously enjoyed by the American Express Company. Whatever one may think is none of this court's business. In applying the Equal Protection Clause, we must be fastidiously careful to observe the admonition of Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardoza that we do not sit as a superlegislature.

354 U.S. at 475, 77 S.Ct. at 1355. In *City of New Orleans,* the Supreme Court rejected the *Morey* analysis and embraced Justice Frankfurter's criticism.

The fact that legislation advantages or adversely affects only one entity does not destroy the constitutional presumption, nor is it inconsistent with a rational purpose. Such a situation was addressed in *Main Central Railway Co. v. Brotherhood of Maintenance Way Employees,* 813 F.2d 484 (lst Cir. 1987), *cert. den.,* 484 U.S. 825, 108 S.Ct. 91 (1987). Main Central and the labor union representing its employees had bargained to impasse. Section 160 of the Railway Labor Act, (45 U.S.C. § 160), prohibited the parties from changing the conditions out of which the dispute arose until after a 30-day cooling off period. The cooling off period expired and Main Central unilaterally instituted new work rules and reduced wages.

On August 12, 1986 Congress enacted a "Joint Resolution to provide for a temporary prohibition of strikes or lockouts with respect to the Main Central Railroad Company and Portland Terminal Company labor-management dispute." Act of August 21, 1986, Pub. L. No. 99-385, 100 Stat. 819. The impact of that Act was to require Main Central to revert to its earlier wages and working conditions. The district court dismissed Main Central's complaint and Main Central appealed.

The First Circuit, citing *City of New Orleans v. Dukes, supra*, held that the test of constitutionality remained one of rationality regardless of the number of parties affected by the legislation, and that "a classification does not become irrational or unconstitutional solely because it is specific." 813 F.2d at 490. The court noted that even when legislation specifically names the single party adversely affected, it is still "subject only to the qualification that it must be rationally related to a legitimate state interest." 813 F.2d at 491, quoting *City of New Orleans v. Dukes, supra*, 427 U.S. at 303, 96 S.Ct. at 2516.

Main Central argued that there no doubt were hundreds of active railroad labor disputes, and that Congress could not constitutionally impose an additional cooling off period in only one of them. The court disagreed, noting that "[i]t was the Main Central-BMWE dispute that in Congress' judgment was threatening to disrupt interstate commerce. This is not arbitrary or irrational. . . . " 813 F.2d at 492.

Central States confuses purpose with effect. Legislation can have a rational public purpose, that is, be enacted based upon a rational view of the appropriate

scope of a scheme of regulation, irrespective of the number of entities it might affect.

While it is not Lady Baltimore's burden to show that the Amendment is rationally related to a public purpose, both the district court and the Seventh Circuit correctly noted that the legislative and case law history surrounding MPPAA demonstrate that Congress was pursuing a rational, public purpose in modifying, through the Amendment, the scheme of withdrawal liability established in MPPAA (Appendix, pp. 8a-9a, 17a-28a).

The withdrawal liability scheme enacted by Congress clearly benefitted multiemployer pension funds at the expense of contributing employers. As this Court noted in upholding the constitutionality of MPPAA, "[i]n the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 222-23, 106 S.Ct. 1018, 1025 (1986).

Having exercised its constitutional power to create withdrawal liability and to do so retroactively, *see Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709 (1984), Congress then began modifying that scheme. Congress eliminated retroactive withdrawal liability under MPPAA when it adopted Section 558 of the Deficit Reduction Act of 1984 (noted at 29 U.S.C. § 1381). In *Long Island Oil Products Co. v. Local 553 Pension Fund*, 775 F.2d 24 (2nd Cir. 1985), the pension fund contended that Section 558 was unconstitutional because it retroactively and irrationally deprived it of anticipated withdrawal liability payments from an employer who had withdrawn between April and September of 1980.

The Second Circuit noted that Congress had concluded retroactive application, which had been thought necessary to prevent withdrawals in anticipation of MPPAA, had an unduly burdensome effect on employers who withdrew between April and September 1980. Congress also decided that, far from withdrawing in anticipation of the enactment of MPPAA, many employers who withdrew during the retroactivity period were surprised by its enactment. *Id.* at 28. The court concluded that:

> Congress has vast discretion when adjusting and distributing the economic benefits and burdens relating to employers, plans and a government agency. It is not our task to decide who should receive what benefit, and at whose expense. *Congress singled out a group of employers who were treated unfairly under the provisions of a previous Act. That determination seems reasonable. Congress acted to correct this perceived inequity.* Again, the remedy chosen appears reasonable. Such legislation may not be stricken simply because it arguably shifts some burdens to multiemployer plans, other employers, and the PBGC; nor should a court consider itself a "super-legislature" and reevaluate the balance that Congress has struck.

Long Island Oil Products Co. v. Local 553 Pension Fund, supra, at 29 (emphasis added).

The rationale articulated in *Long Island Oil Products Co.* applies here. Certainly Lady Baltimore did not withdraw from Central States in anticipation of or in an attempt to avoid the provisions of MPPAA. The 1979

Agreement was executed even prior to the date (February 27, 1979) that the PBGC submitted the recommendations to Congress that ultimately resulted in the passage of MPPAA in September of 1980. If Congress could rationally decide to eliminate withdrawal liability for employers who withdrew from April to September of 1980, it certainly could act rationally by eliminating that liability for any employer who agreed in January of 1979 to withdraw at a subsequent date.

Congress further adjusted the effective date for the imposition of withdrawal liability for certain employers who had binding agreements to withdraw which were entered into before September 26, 1980. In subsection (d) of Section 558 of DEFRA Congress adopted what is entitled a "special rule for certain binding agreements." That rule is: "In the case of an employer who, on September 26, 1980, has a binding agreement to withdraw from a multiemployer plan, subsection (a)(1) shall be applied by substituting 'December 31, 1980' for 'September 16, 1980'." Pub. L. No. 98-369, § 588(d), 98 Stat. 899 (July 18, 1984); 29 U.S.C. § 1381, note.

The facts in this case are not meaningfully distinguishable. The 1979 Agreement was a binding agreement to withdraw entered into prior to September 26, 1980. But for the fact that its actual withdrawal occurred after December 31, 1980, Section 558(d) of DEFRA would have voided Lady Baltimore's withdrawal liability.

The Amendment simply amplifies the provisions of Section 558(d) of DEFRA by eliminating withdrawal liability for one or more employers with binding agreements before September 26, 1980 whose withdrawal

occurred after December 31, 1980. The congressional intent, throughout, has been to ease the transition into a system of withdrawal liability by exempting employers from coverage if they either withdrew or had binding agreements to withdraw prior to September of 1980.

As this Court noted in *Connolly v. Pension Benefit Guaranty Corp., supra,* "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." 475 U.S. at 227, 106 S.Ct. at 1027, quoting *FHA v. The Darlington, Inc.*, 53 U.S. 84, 91, 79 S.Ct. 141, 146 (1958). Nor can Central States object that the corrective step taken in the Amendment is a smaller step than that taken by Congress when it adopted Section 558(d) of DEFRA. Congress is entitled to "take one step at a time," *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465 (1955) and need not "strike at all evils at the same time." *Semler v. Dental Examiners*, 294 U.S. 608, 610, 55 S.Ct. 570, 571 (1935). The fact that the Amendment did not define the "affected class at a greater level of generality" is immaterial. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 471, 79 S.Ct. 2781, 2804 (1977). Whatever its degree of specificity, the Amendment is "merely an extension to a constitutionally valid scheme." *Main Central Railway Co. v. BMWE, supra,* 813 F.2d at 493.

After reviewing the post-MPPAA legislative history, including Section 558(d) of DEFRA, the district court in *Lady Baltimore II* held:

> This provision [Section 558(d) of DEFRA], like the subsequent Amendment that we examined, addressed admittedly narrow situations, but ones the Congress could rationally have decided

> required correction in light of Congress' decision to change the retroactive application of MPPAA. . . .

The Seventh Circuit also found that there is nothing whatsoever suspect in the specific classification adopted by Congress here:

> By Section 558(a) of the Deficit Reduction Act of 1984, Congress eliminated withdrawal liability for employers who had withdrawn from ERISA plans between April and September 1980. And later it allowed employers who were parties to binding withdrawal agreements to escape withdrawal liability even if their withdrawal had not taken effect until the end of 1980. See Historical Note to 29 U.S.C. § 1381. These enactments – which while eliminating the most conspicuous retroactive features of the Act failed to benefit Lady Baltimore because it had withdrawn from its ERISA pension plan after 1980 – suggest that Lady Baltimore has a claim for relief that goes beyond friendship with powerful legislators. *For all we know it is the only employer to have fallen through the cracks in the amendatory legislation,* the validity of which is not questioned.

Appendix 8a-9a (Emphasis Added).

It is worth noting that Congress was aware of and may have considered Central State's actions as a further rationale for the Amendment. For example, Central States knew that the 1979 Agreement provided for a complete cessation of all obligations to it as of January 12, 1982, and initially refused to accept contributions from Lady Baltimore. However, in December 1980 it changed its position and accepted contributions without protest or reservation of rights. Central States also accepted Lady

Baltimore's restrictively endorsed check as full payment of all obligations.

Congress may also have recognized that Lady Baltimore had already paid far more than its fair share to Central States. The actuarial value of Lady Baltimore's contributions, even prior to the date that the Amendment was adopted, was more than double the amount that Central States could ever reasonably be expected to pay out in pension benefits to the small number of Lady Baltimore employees who were vested in benefits.

Indeed, Congress might well have agreed with Lady Baltimore's contention in *Lady Baltimore I* that imposition of withdrawal liability under these circumstances was not what Congress had initially intended, and would violate substantive due process. As Justice O'Connor noted in her concurring opinion in *Connolly v. Pension Benefit Guaranty Corp., supra,* the Court was not in that case upholding the constitutionality of MPPAA as applied to situations where "an employer may be liable to the plan for substantial sums even though that employer's contributions plus its allocable share of plan earnings *exceed* the present value of all benefits accrued by its employees." 475 U.S. 236, 106 S.Ct. 1032 (emphasis in original).[4]

---

[4] Justice O'Connor's views may well have attracted additional support on the Court. C*f*, ***Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,*** No. 91-904 (U.S.) (Pet. granted May 26, 1992). The suggestion by Central States that the granting of the petition in ***Concrete Pipe*** forms the basis for granting the

(Continued on following page)

As noted above, it is Central States' burden to present facts which preclude the assumption that the Amendment rests upon some rational basis. Central States cannot meet that burden by advancing the demonstrably false notion that Congress can have a public purpose only if its actions affect a group, and by ignoring the clear legislative history which shows that Congress had second thoughts about applying MPPAA retroactively or to employers who had a binding agreement to withdraw prior to its enactment.

The district court correctly held that "[w]e are not prepared to *presume* that this narrowly-tailored provision is irrational and arbitrary. Indeed, we are obliged to do just the opposite" (Appendix p. 29a). As the Seventh Circuit properly noted:

> To say that Congress cannot honor an equitable claim for exemption from a harsh law merely because it is the claim of only one firm – that a federal statute cannot have but one beneficiary – would be tantamount to ruling private bills unconstitutional . . . Furthermore, the interference with economic freedom here – the interest

---

(Continued from previous page)

current petition (Petition, pp. 19, 21) is misplaced. If the Court in ***Concrete Pipe*** holds that MPPAA is constitutional as applied to employers whose contributions far exceeded the vested benefits of its employees, that holding would have no impact upon the facts presented here. We do respectfully submit that if the Court is otherwise disposed to grant the present petition, it should delay in doing so on the ground that a holding in ***Concrete Pipe*** that MPPAA is unconstitutional as applied would render the present petition moot.

> that underlies the "liberty of contract" jurisprudence that Central States' complaint evokes – is not the exemption of Lady Baltimore from the Multiemployer Pension Plan Amendments Act; it is the Act itself . . . Not the Act, but the Amendment to the Act exempting Lady Baltimore, does homage to liberty of contract. It restores contractual rights infringed by the Act that it amended. We cannot divine what constitutional policy would be furthered by invalidating the Amendment.

Appendix, p. 9a.

II. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THIS COURT'S EQUAL PROTECTION DECISIONS.

Central States cites *City of New Orleans v. Dukes, supra,* for the proposition that the equal protection clause requires "that the classification challenge be rationally related to a legitimate state interest" (Petition, p. 20). As noted above, *City of New Orleans v. Dukes* contradicts the argument that a classification which contains only one or two entities cannot be rationally related to a legitimate state interest. The size of the classification has no bearing whatsoever upon the existence of a "legitimate state interest." The district court below dealt with Central States' arguments rather summarily:

> Economic legislation "that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose." *Hodel v. Indiana,* 452 U.S. 314, 331 (1981). The

> *Hodel* Court went on to say that a provision will fail under this analysis if its "treatment of different groups of persons is so unrelated to the achievement of any combination of legitimate purpose that (a court) can only conclude that the legislature's actions were irrational." *Id.* As in due process analysis, "such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness or irrationality." *Id.* at 331-32. Again, we cannot say that Congress' move to adjust the provisions of MPPAA is so irrational and arbitrary as to fall outside of that body's legitimate purpose in shifting economic burdens." Appendix, pp. 29-30a.

The contention by Central States – not presented to the district court or the Seventh Circuit – that "Congress created a special benefit for Lady Baltimore that other similarly situated companies did not receive, and singled out Central States alone to pay it" (Petition, p. 21) is unsupported by any reference to the record and is simply incorrect. It may be correct that "a typical collective bargaining agreement extends for three years" and that any employer could "foresee the termination of its contractual obligation to contribute by 1983 unless it was further (voluntarily) extended" (Petition, p. 20). Those "facts," if true, do not begin to reach the situation involving Lady Baltimore.

The 1979 Agreement was a binding agreement to withdraw in January of 1982.[5] An employer with a pre-

---

[5] This was an agreement to make a mid-term modification, as the contract between Lady Baltimore and the Union did not

(Continued on following page)

MPPAA binding agreement to withdraw is clearly distinguishable from an employer who could foresee in 1979 that its labor agreement was going to expire in 1983. Indeed, under the National Labor Relations Act the expiration of a contract does not justify termination of fringe benefit contributions. *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107 (1962); *Hinson v. NLRB*, 428 F.2d 133, 136 (8th Cir. 1970).

The Seventh Circuit correctly noted that employers who had binding agreements to withdraw entered into prior to the adoption of MPPAA are a class whom Congress could rationally decide to exempt from MPPAA coverage (Appendix, pp. 8a-9a). It is within that class of employers that the Amendment clearly falls:

> We could not pronounce the adjustment in liabilities brought about by the Lady Baltimore Amendment irrational in a constitutional sense unless conceivably we were pointed to other employers in the identical situation as Lady Baltimore yet stuck with withdrawal liability. That would be a test of the continued vitality of the rationality standard in the sphere of economic regulations. But Central States points to no employers comparable (let alone identical) to Lady Baltimore yet subject to withdrawal liability. If a statute of general application fits all firms within its scope but one, the exemption of

---

(Continued from previous page)

expire until May of 1982. Contrary to Central States' assertions, Lady Baltimore could not have avoided a withdrawal "by extending its contract." (Petition pp. 20-21) Contributions under the contract had ceased in January of 1982, four months before the 1979 Agreement expired.

> that one would not be irrational. We cannot say that this is not the case here, because Central States has offered no evidence or even argument to make us think otherwise and also because Lady Baltimore was not the first firm to win a congressional reprieve from withdrawal liability.

(Appendix, p. 8a).

While Central States may believe that Congress was wrong in exempting Lady Baltimore, equal protection analysis requires only that "the question is at least debatable." *United States v. Carolene Products Co., supra,* 304 U.S. at 154, 58 S.Ct. at 784. *See also, Minnesota v. Cloverleaf Creamery Co.,* 449 U.S. 456, 101 S.Ct. 715 (1981) and cases cited therein. Congress clearly found the issue debatable, both in Section 558 of DEFRA and in the Amendment.

III. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLECT WITH THIS COURT'S TAKING CLAUSE DECISIONS.

The district court correctly noted that this Court has "rejected the argument that MPPAA withdrawal liability is a prohibited taking" (Appendix, p. 31a). The court quoted from *Connolly v. Pension Benefit Guaranty Corp.,* 475 U.S. 211, 223, 106 S.Ct. 1018, 1025 (1986), as follows:

> In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others . . . Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation

> requires one person to use his or her assets for the benefit of another (Petition, p. 31a).

The Court in *Connolly* also noted that "[l]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Id.* at 223, quoting from *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, at 15-16, 96 S.Ct. 2882 at 2892-2893 (1976).

It would be anomalous indeed to conclude that while the imposition of withdrawal liability did not constitute a taking, relief from the imposition of such liability does. Central States' Petition does not even attempt to distinguish this Court's decisions in *Connolly* or in *Turner-Elkhorn*.[6] Instead, Central States quotes from *Webb's*

---

[6] *Connolly* identified three factors which have "particular significance" in determining whether there has been a taking: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action (475 U.S. at 225, 106 S.Ct. at 1026).

(1) The economic impact of the Amendment on Central States is negligible. Central States receives millions of dollars of income daily. "Any loss to Central States will be spread among this large group of firms and workers, with the Pension Benefit Guaranty Corporation and ultimately the federal taxpayer in the background to ensure the vested pension rights of participants in Central States plans" (Appendix, p. 10a). Moreover, Central States has already benefited monetarily by its relationship with Lady Baltimore. The present value of Lady Baltimore's previous contributions to Central States is approximately double the amount of money that Central States will

(Continued on following page)

Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 101 S.Ct. 446 (1980), a case involving interest accruing on an interpleader fund deposited in the registry of a Florida county court.

Central States has apparently abandoned the argument, advanced to the Seventh Circuit, that its right to retain Lady Baltimore's money had been reduced to a final judgment. Instead, Central States now argues that "29 U.S.C. § 1381 created Central States' property interest in Lady Baltimore's withdrawal liability upon Lady Baltimore's withdrawal" (Petition, p. 23). Central States cites no authority for the proposition that 29 U.S.C. § 1381 creates a property interest within the meanings of the Takings Clause, and makes no effort to distinguish *Connolly v. Pension Benefit Guaranty Corp.*, *Usery v. Turner-Elkhorn* or courts of appeals' cases such as *Long Island Oil Products, Inc. v. Local 553 Pension Fund, supra*. Indeed,

---

(Continued from previous page)

ever pay out to the handful of Lady Baltimore employees who had vested benefits. (2) Nor has the Amendment interfered with Central States' distinct investment-backed expectations. As ***Connolly*** notes: "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." 475 U.S. at 227, 106 S.Ct. at 1027, quoting ***FHA v. The Darlington, Inc.***, 53 U.S. 84, 91, 79 S.Ct. 141, 146 (1958). (3) The "character of the governmental action" embodied in the Amendment is simply to add an additional employer with a pre-MPPAA binding agreement to withdraw (perhaps, as the Seventh Circuit noted, the "only employer to have fallen through the cracks in the amendatory legislation" (Appendix, p. 9a)) to the list of those previously exempted by congressional action.

Central States does not even address the fact that under the scheme created by MPPAA, Central States was receiving only *interim* withdrawal liability payments. As the Seventh Circuit noted:

> The entitlement in question is like a landlord's right in a security deposit. He can hold the money but he must give it back eventually unless some condition materializes that allows him to keep it. Central States held the interim payments only as (in effect) a bailee until its right to impose withdrawal liability on Lady Baltimore was finally adjudicated. (Appendix, p. 14a).

Conclusion

For the reasons set forth above, Central States' Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

James G. Baker
Spencer Fane Britt & Browne
1000 Walnut, Suite 1400
Kansas City, MO 64106
(816) 474-8100

Attorneys for Respondent